In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-312

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

vs.

DAVID WARE, *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California for the First Appellate District

Reply Brief for Petitioner

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October 4, 1973

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INTRODUCTION

At the heart of this case lies the central fact that the securities industry is the only industry in this country which is subjected to federally mandated self-regulation. The statutory scheme calls for the registration of stock exchanges and the filing and review of their constitutions, by-laws, and rules by the Securities and Exchange Commission. There is nothing more fundamental to this scheme of self-regulation than the regulation of the individuals who deal with the public on behalf of the member firms.

The New York Stock Exchange has fully recognized this and has established rigid standards with respect to personal integrity and a knowledge of the securities industry which must be met by registered representatives. Among other things, it requires registered representatives to agree to arbitrate any dispute they may have with their employer, a member firm, and the Exchange (with the implicit approval of the Commission) has made this a condition of their obtaining a "license" to do business as a registered representative.

The 1934 Act was designed to protect the investor and restore public confidence in the industry. Clearly, it was and is in the public interest not only to have registered representatives of the highest integrity, but also to eliminate controversy between registered representatives and the member firms by whom they are employed, which would be heightened by the normal and undue publicity accompanying the trial of lawsuits.

This case is not a case involving the wage rights of seamen, who were wards of the court, or bricklayers, or ditch diggers. It is, on the contrary, a case involving the regulation of a highly specialized profession, requiring of those who practice it, the highest standards. To maintain the standards, a pervasive system of self regulation has been adopted by the New York Stock Exchange. It is a case raising issues determinative of the powers of the self regulation of the industry. Should one state, California, for example, be able by statute to totally undercut the sound rules of self regulation promulgated by the Exchange under the authority of the 1934 Act? Should one state, California for example, be able to void an agreement (valid under Federal law and in most other states) simply by the application of a labor law or a so-called antitrust law ruled inapplicable elsewhere? Petitioner submits the answers are no.

What must be decided here is how to balance, if ever so delicately, the strong and clear federal policies of self regulation of the securities industry and preference for arbitration against the right of the states to undercut the rules providing for self-regulation and the national and state policy favoring arbitration. We shall deal seriatim with Respondents' attempt to convert a case involving these important national considerations into a local labor matter or a due process case.

I.

LABOR CODE SECTION 229 IS NOT CONSONANT WITH FEDERAL LAW AND POLICY

The central legal issue in this case is whether, given a Congressionally mandated obligation on exchanges to adopt rules and regulations as part of a self-regulatory scheme, and a strong federal statutory and judicial policy in favor of arbitration, Rule 347(b) of the New York Stock Exchange, reflecting a synthesis of these policies, must be subservient to California Labor Code § 229, which the court below deemed to be an exception to a similar state policy favoring arbitration. (App. 66).

This Court, in considering the validity of state laws in light of federal laws touching the same subject, has confirmed that "no one crystal clear distinctly-marked formula" applies. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). However, where the state policy or statute produces a result inconsistent with the objectives of the federal statute,[1] evidence of preemption or supersession is usually found, *e.g.*, *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218 (1947).

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1. The federal "statute" may, of course, be a regulatory or administrative rule or order, *e.g.*, *Free v. Bland*, 369 U.S. 663 (1962).

California Labor Code § 229 produces just such an inconsistent result here. It does so because, when the competing policies, state and federal, are balanced, it becomes clear that the combined federal policies referred to above can only be fully effectuated by disregarding California Labor Code § 229.

The conflict produced here essentially involves a choice of forum for resolution of a dispute, and is the type of conflict which this Court has faced before. The resolution of that conflict, to paraphrase the late Mr. Justice Harlan, involves forging a proper relationship between available arbitral and judicial forums. *United States Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 359 (1971) (concurring opinion). In creating a proper relationship close attention has been focused on the policies underlying arbitration and those on which the availability of alternative forums are founded. 400 U.S. at 359.

From their analysis of these competing policies, respondents argue that California Labor Code § 229 is entirely consonant with federal law and policy. That analysis, however, presents not only a misleading picture of the posture of respondents in the industry structure, but also overlooks other important considerations which tip the balancing scales in favor of arbitration. Rule 347(b) is necessary to effectuate the purposes of the 1934 Act because it fulfills both the Congressional intent to involve the exchanges in the self-regulatory scheme and also the federal policy in favor of arbitration set forth in the United States Arbitration Act and in other federal laws recognizing it as the key element of any scheme of industrial self-regulation. These combined federal policies are thwarted from full operation by the Court of Appeal decision.

Congress expressly granted rule-making authority to registered stock exchanges in the 1934 Act. 15 U.S.C. § 78f.

Rule 347(b) was promulgated by the Exchange in fulfillment of that objective. As Mr. Justice Goldberg observed in *Silver*:

> "It is no accident that the Exchange's Constitution and rules are permeated with instances of regulation of members' relationships with nonmembers . . . ." *Silver v. New York Stock Exchange*, 373 U.S. 341, 354 (1963).

The arbitration rule was deliberately designed to carry out the Exchange's duty under § 6, 373 U.S. 341, 353-54 & n. 9.

Aside from the clear statutory language and the historical context in which the 1934 Act was adopted,[2] there are other indicia of Congressional intent.

Under § 6(c) Congress expressly authorized an exchange to adopt rules not inconsistent with the Act and the "applicable laws of the State in which it is located." 15 U.S.C. § 78f(c). Respondents urge that the New York Stock Exchange is located in California, both as an entity itself and through its members and, therefore, is subject to California law under § 6(c). That a corporation or association is located where its stockholders or members reside is a concept long since discredited, *e.g.*, 28 U.S.C. § 1332(c). Nor is the Exchange "located" in California. Although Congress did not define "located" in the 1934 Act, it has used the term in other statutes in which the term has uniformly been interpreted to mean the state of incorporation or the state where the corporation's principal place of business is conducted. *E.g., Texaco, Inc. v. Federal Power Comm'n*, 377 U.S. 33 (1964) (Natural Gas Act, 15 U.S.C. § 717r(b); *United States National Bank v. Hill*, 433 F.2d 1019 (9th Cir. 1970) (National Banking Act, 12 U.S.C. § 94). Applying

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2. *See, e.g.*, Report of the Subcommittee on Securities, U.S. Senate Committee on Banking, Housing and Urban Affairs, 93rd Cong., 1st Sess. 137-144 (1973) (hereinafter cited as "Securities Industry Study").

these standards, New York is clearly the state where the Exchange is located. Congress undoubtedly sought to create uniformity of application by referring to the laws of one state. That uniformity is defeated by the application of California law, since New York has no statute comparable to California Labor Code § 229.

The self-regulatory system has also received renewed approval by both the SEC and the Congress. Some thirty years after the 1934 Act had been adopted the Commission made a special study of the American Stock Exchange, in which it concluded:

> "Regulation in the field of securities should continue to be based on the principle of giving maximum scope to self-regulation, wherever and to the extent that a regulatory need can be satisfactorily met through self-regulation." 4 SEC, Report of Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess. 726 (1963).

The Commission obviously felt that the statutory concept of substantial reliance on industry self-regulation had stood the test of time. There is nothing in the record to support respondents' claims that the self-regulatory need—control over the employment relationship—cannot satisfactorily be met by self-regulation of the type embodied in Rule 347(b).

Of course, Congress did not intend the self-regulation be completely unsupervised. But, as petitioner has previously argued, § 19(b) gives the SEC power to review and disapprove Rule 347(b) or any other Exchange rule, as this Court recognized in *Silver*. 373 U.S. at 357.[3]

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3. In its motion for reconsideration of an order staying the effectiveness of new institutional membership rules, the Commission referred to section 19(b) of the 1934 Act as the embodiment of the philosophy of supervised self-regulation. *PBW Stock Exchange, Inc. v. SEC*, CCH Fed. Sec. Law Rep. ¶ 94,005 (3d Cir., May 1973).

Thus, §§ 6(a), 6(c) and 19(b) articulate both the ability and duty to review rules and regulations to insure that exchange rules are appropriate and in the public interest.

The most recent Congressional evaluation of the structure of the regulatory system, while criticising certain weaknesses, has reaffirmed both the concept and the results:

> "The securities industry's unique system of self-regulation has shown great strength in some areas and in general has served the industry well." Securities Industry Study at 137.

Rule 347(b) is a particularly appropriate exercise of this self-regulatory function, since it incorporates arbitration into the regulatory scheme. Arbitration, enjoying the support of the federal policy expressed in the U.S. Arbitration Act, has long been recognized by this Court to be a key element of any scheme of industrial self-regulation. Relevant decisions in this court have expressed a national labor policy favoring the settlement of disputes by means of arbitration in lieu of litigation. This Court's opinions, based on § 301 of the Labor Management Relations Act of 1947, have been predicated on the theory that arbitration is a substitute for industrial disruption. The arbitration procedure lies in the very heart of the policy of industrial self-government. This policy is not dissimilar to the supervised self-regulation which Congress has mandated in the securities field. Just as in the labor field, arbitration performs functions which bring experience and expertise to a special area.

The question of the enforcement of the non-competition clauses of the Merrill Lynch Profit Sharing Plan depend in large part on the facts and nature of the industry, which is better equipped to handle these problems. The evaluation of the clause depends on the circumstances involved,

the nature of the industry needs, and the effect on the investing public.

The disposition of the issue of arbitrability presented here caused the Court of Appeal to examine and interpret a provision in the agreement in light of a legal principle without consideration of the context in which the clause was adopted. Thus in reality it purported to decide the merits of the dispute under the guise of determining arbitrability.

The arbitration policy is also embodied in federal law. United States Arbitration Act, 9 U.S.C. § 1 *et seq.* Petitioner has previously argued that the United States Arbitration Act, and the substantive law established thereunder, must be considered in this case, particularly in order to preclude forum shopping that may and does have conflicting results.

In *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956) this Court held that the Act applied only to the kinds of contracts specified in sections 1 and 2, namely, admiralty contracts or transactions in commerce. The contract here, namely the RE-1 Form, is a transaction involving commerce because respondents' services as account executives called for dealing with the public wherever located and to use the facilities of interstate commerce in conducting Merrill Lynch's business on an interstate basis. *Accord, Dickstein v. duPont*, 320 F.Supp. 150 (D. Mass. 1970), *aff'd*, 443 F.2d 783 (1st Cir. 1971). It is, in all practical respects, identical to the consulting agreement which this Court found to be a transaction in commerce under the Act in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).[4]

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4. Section 1 of the Act exempts from its operation "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce. 9 U.S.C. § 1. The exclusion has been uniformly interpreted to refer only to workers engaged in the movement of commerce or so closely related

Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F. 2d 402 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960), established that the validity, revocability and applicability of arbitration agreements affecting commerce are to be determined under *federal* law, a result approved in *Prima Paint*.

The substantive law established in the United States Arbitration Act in *Robert Lawrence*, and as applied in *Prima Paint* and *Dickstein*, is contrary to the result reached by the Court of Appeal below. There is no question that Merrill Lynch could have sought arbitration below under the United States Arbitration Act. The result created by the divergent approaches of the *Dickstein* court and the court below, is apparent. If permitted to stand, it will place a premium on the forum in which the party desiring to litigate chooses to bring his action. It further places the party desiring to arbitrate in a position that is fundamentally unfair to him. Labor Code § 229 precludes the uniformity that is not only desirable, but required under the federal substantive law embodied in the Act.

Sections 3, 4 and 5 of the Act have been classified as procedural devices for the implementation of § 2. Section 4, which provides the power to compel arbitration, 9 U.S.C. § 4, is identical with its California counterpart under which petitioner sought arbitration. California Code of Civil Procedure, § 1281.2. The right is of little value if litigation can be concurrently maintained. When state law prevents the operation of these sections, the federal right to arbitration is threatened and state law should not control.

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to it to be part of it in practical effect. Respondents here are not "workers" within the meaning of the exclusion from § 1 of the Act. *E.g., Bernhardt v. Polygraphic Co.*, 218 F.2d 948, 951-52 (2d Cir. 1955), *rev'd on other grounds*, 350 U.S. 198 (1956); *Dickstein v. duPont*, 320 F.Supp. 150, 152 (D. Mass. 1970), *aff'd*, 443 F.2d 783, 785 (1st Cir. 1971) (registered representative not worker engaged in commerce).

Different results due to the fortuity of the forum have already occurred. The Minnesota Supreme Court has upheld the Exchange arbitration rules under Minnesota's arbitration statute in an action by a registered representative challenging a non-competition clause in a member firm's pension plan. *Morris v. Francis I. duPont & Co.*, 189 N.W.2d 487 (Minn. 1971). In addition to the *Dickstein* case, an even more striking example of the conflict comes from the Seventh Circuit. There, a former Merrill Lynch employee brought a class action challenging the invalidity of the same non-competition clause involved here on the ground that it violated the Sherman Act. The Seventh Circuit upheld a district court order compelling arbitration under the United States Arbitration Act. *Cullinan v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 72-2046, (7th Cir., April 27, 1973).[5]

The reasons why it is necessary to apply federal law are cogently set forth in a recent decision of the New York Court of Appeal:

> "It is particularly important to apply Federal Law in the present case for, to hold otherwise would (1) permit, indeed encourage, forum shopping; (2) prevent and undermine the need for nationwide uniformity in the interpretation and application of arbitration clauses in foreign and interstate transactions; and (3) permit individuals to circumvent the national law relating to arbitration agreements as called for by the F.A.A. [Federal Arbitration Act]." *A/S J. Ludwig Mowinckels Rederi v. Dow Chemical Co.*, 307 N.Y.S.2d 576 (N.Y.Ct.App.), *cert. denied*, 398 U.S. 939 (1970).

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5. A copy of this unreported opinion is attached to this brief as Appendix A. Counsel for Petitioner requested permission of the Seventh Circuit to reprint the opinion and was referred to Seventh Circuit Rule 28(4) which prohibits citation to an unreported opinion "within the circuit." Counsel has interpreted this rule to permit citation to this Court.

In that case the appellant sought to prevent arbitration under a New York law which barred arbitration if it were time-barred. No limitation is contained in the federal Act. Chief Judge Fuld recognized that a state law precluding arbitration on a ground not recognized by federal law "denied the full measure of enforceability provided for by the" federal Act. 307 N.Y.S.2d at 663. In so doing he gave full recognition to both *Robert Lawrence* and *Prima Paint*, as the Court of Appeal below should have done here. In reaching its result the Court of Appeal totally ignored these federal policies and deprived petitioner of its rights under these policies and federal law, contrary to Congressional intent.

From the purposes and intent of the synthesis of these federal policies, it becomes apparent that Rule 347(b) carries out these objectives. One of the principal duties of the Exchange under the Congressional mandate is to protect the investing public and insure just and equitable trade practices. Exercising the rule-making function over the employment relationship promotes that objective, since it is those very employees who assist the investing public in securities transactions and who represent their member firms to the investing public. In no other industry is confidence in the integrity and abilities of those involved in its administration so fundamental to its operation. As witnessed in recent years, it is no overstatement that member firms have experienced severe financial problems, including failures resulting in substantial losses to the investing public. Although Congress has recently enacted laws pertaining to this particular problem, Securities Investor Protection Act, 15 U.S.C. §§ 78o(c)(3), 78 aaa *et seq.*, and is presently considering other legislation, *e.g.*, Securities Industry Study, *supra* note 2, the loss of confidence in the industry in the past five years is apparent. Protracted liti-

gation between member firms and their employees over all kinds of claims, including those relating to compensation, further erode the public loss of confidence. Without arbitration there is no prompt and fair method of resolving those disputes. In the context of the industry's responsibilities, Rule 347(b) is clearly necessary to the fulfillment of that objective and particularly to sustain public confidence in the industry itself, a basic objective of the 1934 Act.

Rule 347(b) covers disputes relating to both present and former employees. Exchange authority over that relationship must be pervasive, extending both to present employees and those who have left the industry, as part of the Exchange's continuing supervisory role.

To apply state law per se without utilizing the arbitral forum strikes at the heart of that process. Abstention by the judiciary in order to allow the dispute to be resolved as agreed upon does not divest the court of jurisdiction. But it does promote the federal intent evidenced by the rule-making grant, the Exchange's promulgation of the rule in fulfillment of that intent, the Commission's implicit approval of the rule when it was first filed as part of the registration process, and federal arbitration law and policy.

II.

BUSINESS AND PROFESSIONS CODE SECTION 16600 DOES NOT AND SHOULD NOT PREVENT ARBITRATION

Respondents claim that Business and Professions Code § 16600 stands as an independent basis for denying arbitration. Aside from the fact that it rests on the same footing as Labor Code § 229, there are even more cogent reasons why respondents' argument should not prevail.

In the first place, the section does not even mean what it says, since there are judicially created exceptions to it,

e.g., Gordon v. Landau, 49 Cal.2d 690, 321 P.2d 456 (1958). For example, as the court recognized, *Frame v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, Article 11.1 is valid insofar as it applies to subjects of restraint such as breaches of confidence, trade secrets, and misappropriation of customer lists. (App. 74). The *Frame* court was not directly overruled by *Ware*. *Frame* undoubtedly had in mind not only California Labor Code § 2860[6] but the appropriateness of these issues for arbitration. Such issues, including the enforcement or non-enforcement of the non-competition clause, should be resolved by those experienced in the industry, as they are better equipped to review those needs within the self-regulatory context.

Secondly, arbitration under Exchange rules permits uniformity of interpretation of these clauses by those experienced in the industry. Such uniformity is lost if state laws are applied at the outset to determine the merits of an issue which should be arbitrated. It is inconsistent to permit one employee to retain the benefits of an employment relationship evidencing interstate commerce centered in one jurisdiction, New York, but to deny the employer the right to enforce restrictive covenants valid in that jurisdiction but invalid in other jurisdictions where the employee may conduct the employer's business. To do so places the employee in the latter jurisdiction in a more favorable position than an employee in the former jurisdiction, and serves to diminish the purposes of the employer in protecting his investment in the ability and integrity of the employee, an investment which serves the very purpose of the 1934 Act—to protect the investing public.

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6. "Everything an employee acquires by virtue of his employment . . . belongs to the employer whether acquired . . . during or after the expiration of the term of his employment."

The integrity and training of the registered representative serve the interests of the public investor. The "legislative" powers granted to the Exchange and its members is to be used for the public investor's interests. This sanctioned concept, by its very terms, approves the concept of a group of competitors agreeing to impose restrictions upon themselves, including restrictions relating to competition.[7]

Thirdly, the application of substantive federal arbitration law to achieve the uniformity previously discussed, would, in the federal context, not be denied as a result of federal antitrust statutes. Not only does such a clause not violate those statutes, but under *Prima Paint*, if the issue of fraud in the inducement of the arbitration agreement itself is for an arbitrator to resolve, so should an alleged state antitrust claim.

Fourthly, the Exchange arbitration rules have been upheld in the face of federal antitrust challenges. A state statute is not entitled to treatment in any different manner. To do so not only frustrates the arbitration rule as a self-regulatory rule, but also leads to different results depending upon the application of state law, thus burdening the uniform operation of Merrill Lynch's Profit Sharing Plan.[8]

Lastly, the effect of Business and Professions Code § 16600 is to deprive participants of the Merrill Lynch

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7. Respondent suggests that if other member firms have similar restrictions, such concerted action amounts to a federal antitrust violation. No such violation was pleaded and the record contains nothing to suggest any concerted action.

8. Respondent is correct that, as of September 13, 1972, Merrill Lynch terminated its Profit Sharing Plan, fully vested all active employees on that date, and eliminated the non-competition clause. All benefits, except for a contingency fund, were distributed to employees who were participants on the effective date of plan termination. But that does not change the posture of this case or petitioner's arguments on uniformity, since it is faced with a number of lawsuits identical to this one in other jurisdictions, and it continues to use a non-competition clause in its pension plan.

Profit Sharing Plan who remained with Merrill Lynch of their right to receive their respective portions of any of respondents' forfeitures under Article 5. As applied here, § 16600 is both arbitrary and unequal in its operation, since it completely disregards the rights of all participants other than respondents.

III.

RESPONDENTS' ARGUMENTS THAT ARBITRATION WILL DEPRIVE THEM OF A RIGHT TO A JUDICIAL FORUM AND WILL BE FUNDAMENTALLY UNFAIR ARE NOT SUPPORTED BY LAW OR FACT

Throughout their brief respondents assert a simple theme, namely, that arbitration in this case will deprive them of the right to a judicial forum and will be fundamentally unfair. Neither of these arguments find any support in the record or in relevant and sound legal principles.

A. The Rights and Remedies Provided in the Securities Laws Are Not Applicable to this Dispute.

Relying principally on §§ 6(a)(1), 28(a)(b) and 29(a) of the 1934 Act, 15 U.S.C. §§ 78f(a)(1), 78bb(a)(b), and 78cc(a), respectively, respondents equate the forum conflict here with that conflict present in *Wilko v. Swan*, 346 U.S. 427 (1953). In so structuring the issue they seek to place themselves and their dispute on a level identical to that of the public investor. As Merrill Lynch has previously noted respondents are not investors. They are the subjects, not the objects of the 1934 Act. Moreover, their suit does not involve violations of securities laws. The conflict in *Wilko* was between the policy underlying the United States Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and Congressional policy to provide *security purchasers* with a judicial forum under § 12(2) of the securities Act of 1933, 15 U.S.C. § 77l(2), coupled with a policy prohibiting waiver of these rights in

§ 14, 15 U.S.C. § 77n.[9] The policy factors which led this Court in *Wilko* to a balance giving the rights secured by the securities laws predominance over the federal policy of arbitration are inapposite. Here the federal policies expressed in the securities laws work in concert with the federal policy of arbitration.

Nor, as respondents urge, is every case which has considered the arbitration rules wrongly decided under *Wilko*. Each of those courts[10] recognized and continue to recognize,[11] this fundamental difference between the situation in *Wilko* and the situation present in those cases, and here.

Indeed, each of those courts carefully considered the choice of forum issue in light of the non-waiver provisions of § 29(a) and unanimously concluded that § 28(b) exempts arbitration from § 29(a). Any other conclusion would render the Exchange arbitration rules meaningless, a result Congress cannot have presumed to have intended, and certainly not with respect to a state law.

Respondents look to Article VIII of the Exchange Constitution to argue that petitioner cannot compel them, as non-members, to arbitrate because that article provides in part that any controversy between a member and non-member shall be submitted to arbitration at the instance of the non-member. This overlooks the fact that the non-member's request for arbitration as set forth in the RE-1 Form is the request itself under Article VIII. See *e.g.*, 2R, Appendices D, E. Moreover, the source of authority for Rule 347(b) is independent of Article VIII. As far as Exchange

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9. Respondents claim that the change in language between section 14 of the 1933 Act and section 29 of the 1934 Act manifests an attempt to broaden the scope of the non-waiver provision. The legislative history is silent on this change, but it is quite clear that remedies under the 1934 Act extend to persons other than purchasers, *e.g.*, 15 U.S.C. 78i(e).

10. See cases cited Brief for Petitioner, p. 16 & n. 6.

11. *In the matter of Blair & Co., Inc.*, CCH Fed. Sec. L. Rep. ¶ 94020 (S.D.N.Y., June 1, 1973).

internal organization is concerned, Rule 347(b) is based on the Exchange Constitution, Article III, §§ 5, 6, as well as § 6(c) of the 1934 Act.

Precisely what constitutional rights are violated by arbitration is unclear from respondents' brief. The securities laws do not provide constitutional rights per se. The "agreement" referred to in § 6(a)(1) of the 1934 Act, 15 U.S.C. § 78f(1), which Congress indicated should "not be construed as a waiver of any constitutional right . . . ," is the agreement of an exchange to comply with the Act and SEC rules and regulations. The only other right of constitutional dimension is respondents' alleged right to jury trial. But arbitration itself is always a waiver of a jury trial. Moreover, except for facts as to the dates of employment, amount of benefits, etc., all of which are available from Merrill Lynch's records, respondents have no facts which need to be found by a jury, predicating their right to recovery as flowing from a legal declaration of invalidity of Article 11.1.

B. There Is No Fundamental Unfairness in Arbitration Proceedings.

Coupled with the argument on waiver of rights which respondents make is the concept that, for a variety of reasons, they will not receive a fair hearing in an Exchange arbitration, and will never have their day in court. Any attempt to relate this case to the due process issues in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), must fail at the very outset.

The record is devoid of any evidence to support respondents' claim that they will be treated unfairly. The assumption that arbitration will be conducted in New York overlooks not only the practice of the Exchange, 2 CCH N.Y. Stock Exchange Guide ¶ 2492A, but also petitioners' agreement to arbitrate in California. 2R. Appendix E. The assumption that important due process rights, such as dis-

covery, will be denied, overlooks the fact that petitioner sought arbitration under California law which does provide for discovery, California Code of Civil Procedures § 1282.6, and other due process safeguards, California Code of Civil Procedure §§ 1282 *et seq.*

Lastly, and perhaps most importantly, respondents assume that an arbitration award is final and conclusive. The California statute, however, provides for *judicial* proceedings to confirm, vacate, or modify the award. California Code of Civil Procedure §§ 1285 *et seq.* So does the Federal Act, 9 U.S.C. § 10. That these proceedings would apply to the present dispute was made implicit in *Frame* when that court ordered arbitration. (App. 74). Respondents thus would have a full opportunity to have that issue decided in a judicial forum. In short, the due process issues which respondents raise are simply not present here.

Accordingly, it is respectfully submitted that the order and decision of the Court of Appeal should be reversed.

October 4, 1973.

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Appendix A

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

April 27, 1973

Before

Hon. LUTHER M. SWYGERT, Chief Judge

Hon. ROGER J. KILEY, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

JAMES K. CULLINAN, Plaintiff-Appellant, vs. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., Defendant-Appellee.	No. 72-2046

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

(72 C 1724, Judge Will)

The plaintiff, a registered securities representative formerly employed by the defendant, brought this action on his own behalf and on behalf of "other former employees similarly situated" to challenge the forfeiture of his interest in the defendant's profit-sharing trust plan upon the voluntary termination of his employment with defendant to work for another securities dealer. The plaintiff claims that the forfeiture provisions of the plan constitute an unreasonable restraint of trade and enable the defendant to become unjustly enriched.

As a condition of his employment as a registered representative the plaintiff was required to and did execute and submit to the New York Stock Exchange an application, in which he agreed, inter alia, to refer to arbitration any controversy between him and a member firm arising out of his employment with such firm or the termination thereof. Such a controversy is raised in the complaint herein.

The application which the plaintiff executed became an integral and mutually binding part of his employment arrangement with the defendant, and the defendant is therefore entitled to enforce its provisions, including the requirement that controversies like the present one be settled by arbitration. *Dickstein v. duPont*, 443 F.2d 783 (1st Cir. 1971).

The plaintiff's agreement to arbitrate controversies arising out of his employment or the termination thereof is valid, irrevocable and enforceable. Federal Arbitration Act, Section 2, 9 U.S.C. § 2; *Dickstein v. duPont*, supra. The plaintiff has asserted no substantial grounds for the revocation of his agreement to arbitrate. His allegation that the forfeiture clause violates the federal antitrust laws is without merit. *Austin v. House of Vision, Inc.*, 404 F.2d 401 (7th Cir. 1969).

The Plaintiff has failed to allege facts sufficient to establish that his cause may be maintained as a class action. Moreover, the members of the proposed class would be no more entitled to have this action brought on their behalf than is the plaintiff entitled to bring it on his own behalf, since all registered representatives are required to execute and submit the N.Y.S.E. application in which they agree to arbitrate controversies such as this one.

The judgment of the District Court, dismissing the complaint without prejudice, is AFFIRMED.